No. 12379

In the

United States Court of Appeals

For the Ninth Circuit

ESTATE OF EDWIN F. GILLETTE, HARRIETTE O'NEIL GILLETTE, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONER.

EDWARD H. MCDERMOTT,
WM. M. EMERY,
JOHN S. PENNELL,
111 West Monroe Street,
Chicago, Illinois,
Counsel for Petitioner.

THE GUNTNORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

INDEX.

Citations.

Cases.

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REPLY BRIEF FOR PETITIONER.

Respondent's brief consists largely of a restatement of the reasons given by the Tax Court for its decision. Accordingly, most of respondent's present argument has already been answered in petitioner's main brief. However, some of the points urged by respondent call for further comment.

I.

Preponderance of Evidence, Not "Burden of Proof" or a Presumption, Is Controlling.

Respondent opens and closes his argument with the proposition that petitioner has not met a burden of proving incorrectness of the respondent's determination. We respectfully submit that this misstates the issue before the Court. The true issue is whether the evidence in this pro-

ceeding shows that the decedent was or was not motivated by contemplation of death in transferring the Hartford Building and Lake Beulah properties.

When the petition was filed with the Tax Court, there was a presumption that the respondent's determination was correct. That presumption vanished when evidence was introduced. (Pet. Main Br. 40-43.) From that time on the parties were on an equal footing. Preponderance of the evidence should have been the determining factor.

The Tax Court failed to treat the parties equally. It weighed the presumption against the evidence. Respondent would perpetuate that error. His attempt to take shelter under a non-existent presumption is a tacit recognition that he cannot face the true issue and let the case be decided, as it should be, upon the evidence.

The determination of this issue does not impose an undue burden upon this Court. Substantial conflicts do not appear in the evidence. The conflicts come between the evidence and the inferences or assumptions made by the Tax Court and the respondent. This Court is authorized and competent to strike down unwarranted inferences and assumptions and reach the proper conclusion on the actual facts. (Pet. Main Br. 19-21.)

II.

Decedent's Health, Character and Attitude Toward Property Have Affirmative Significance.

Respondent attempts to avoid the force of the abundant evidence of decedent's character, activities, health and mental attitude. (Resp. Br. 18.) This evidence was of substantial significance in these respects:

(1) *Decedent Reacted Only to Imminent Problems.* Respondent freely recognizes that this evidence established

that the decedent had no thoughts of imminent death in 1938. The evidence of decedent's character, consistent over a period of 20 years or more, showed plainly that he was not a man who would look far into the future and be influenced by remote motives. He was a man who reacted only to immediate problems, and then only when action was forced upon him. An imminent motive was the only sort of thing that would influence him. Accordingly, a showing that he did not contemplate imminent death is alone sufficient to establish that the property transfers were not made in contemplation of death.

(2) *Concern Over Property and Its Devolution Was Foreign to Decedent's Character.* The evidence stands squarely opposed to respondent's assertion that decedent "would naturally be concerned about his financial resources and the devolution of his property at his death,"* and that "the logical conclusion is that in making the transfers the decedent was motivated by the thought of death in the sense that he intended to prevent his proposed marriage from interfering with the devolution of these properties to his children at his death." (Resp. Br. 24, 22.) For more than 20 years before 1938 the decedent had shown no worry, concern or foresight over property matters. He had not conserved or enhanced his property for himself or for the future benefit of his children. With these facts as a premise, to infer that the decedent suddenly became concerned

* In *Colorado Nat. Bank* v. *Comm.*, 305 U. S. 23 (1938), the decedent, age 80, created an $800,000 trust, with the income to be accumulated for his life, then paid to his daughter for her life with remainders to her descendants. His motive was to secure this property for his descendants and protect it from his stock market speculations. In ruling that this transfer was not made in contemplation of death, the Supreme Court said (p. 27):

> "The mere purpose to make provision for children after a donor's death is not enough conclusively to establish that action to that end was 'in contemplation of death.' Broadly speaking, thoughtful men habitually act with regard to ultimate death, but something more than this is required in order to show that a conveyance comes within the ambit of the statute."

It is plain that Mr. Gillette was far less concerned with property matters and remote events than the normally thoughtful man visualized by the Court.

in 1938 over the devolution of property at his death is not good logic. It is a *non sequitur.*

(3) *Decedent Did Not Actively Contemplate Death.* Respondent attempts to impose upon petitioner a burden of proving that the transfers were affirmatively motivated by purposes associated with life. While we believe that the evidence does clearly show such motives dominating the Gillette transfers, we submit that petitioner does not have that heavy a burden. The fundamental issue posed by the statute is whether the decedent was motivated by contemplation of death. Such contemplation may be negatived by showing that the transfers were actuated by affirmative living motives. But it can also be negatived by showing that the thought of death was not present in the decedent's mind in such force that it would have caused him to take the action under consideration. (Pet. Main Br. 37-40.)

There is abundant evidence in this case that decedent was not the sort of man to entertain such thoughts, or to be motivated by them. Respondent seeks to avoid the force of this evidence, for he has no answer to it.

III.

The Evidence Shows Only a "Living" Motive.

When decedent proposed to marry Miss O'Neil, he told his children that he feared she would not accept unless she were welcomed into the family circle. (Ex. 20: R. 148.) Mrs. Jenks, his sister, and her husband, had objections to the marriage going far beyond a mere lack of warmth. His son, Hyde Gillette, knowing of these objections and seeking to assure his father's marriage and happiness, worked out a detailed program with the assistance of his brother-in-law, Howard Will. After all the details of this program had been developed, it was presented to decedent as a

means of removing the objections to his marriage. It was accepted by him on that basis.

In an effort to avoid this clear-cut "living" motive and to find some justification for the Tax Court's decision, respondent commits a major fault. He attributes to decedent a participation in the detailed planning, although the evidence shows he had no part in it. Respondent contends, in effect, that Hyde Gillette and Howard Will were concerned over the devolution of decedent's property at his death, even impugning their motives in planning the transfers (Resp. Br. 24), and then asserts or assumes, again contrary to the evidence, that decedent had the same thoughts.

The evidence is that in June 1938 decedent was aware that the Jenkses had some objection on financial grounds to his marriage, and when Miss O'Neil visited Chicago in that month she discussed the situation with Hyde Gillette. This necessarily involved only generalities since the ultimate program had not been formulated at that time. It was subsequently developed in detail, but Hyde Gillette purposely did not communicate with decedent on the subject. He waited until his father came to Chicago to discuss it with him.

The matter of providing security for the note owed by Mr. Gillette to Mrs. Jenks was the initial problem, but it was not the only one. Mr. Jenks was also concerned about encumbrances of the decedent's interest in both the Hartford Building and Michigan Avenue properties. (R. 152-153, 162.) This would not have been prevented by a mere mortgage to Mrs. Jenks. Had decedent further encumbered his interest in either property, and a creditor succeeded to his interest, Mrs. Jenks would have been left with a stranger as co-owner and with the possibility of a partition suit and forced sale, with damaging financial consequences

to her. There were even more immediate problems in connection with the Michigan Avenue property. (R. 153-154, 169, 170-171.) To meet these problems posed by Mr. Jenks, transfers in trust of both properties were included in the plan, fortified by an antenuptial agreement. (R. 155-156, 167-168.) To forestall objections by decedent, Hyde proposed inclusion in the Michigan Avenue trust agreement of an income provision for decedent's prospective wife.

The fact that respondent will not face is that the entire program, both in broad outline and details, was formulated by Hyde Gillette and Howard Will. The decedent did not participate. After all the details had been worked out, it was presented to him as an overall program, designed to meet all the points that had been raised by Mr. and Mrs. Jenks without, at the same time, causing undue detriment to decedent.

> "My father's reaction to the plan was that if Howard and I thought it was all right and it met the problems that had arisen for us to go ahead and draw up the instruments." (Testimony of Hyde Gillette, R. 159.)

Respondent purports to find it remarkable that there was no expression on the part of the decedent with respect to disposition of any of his property to his children at his death. (Resp. Br. 28, footnote 6.) We do not find it remarkable that the decedent, in September, 1938, acted entirely in keeping with his character over many years preceding. We think it remarkable that respondent should expect this Court to consider that, because he was contemplating remarriage, he would naturally be concerned about his financial resources and the devolution of property at his death, particularly in view of his lack of interest in property matters displayed for so many years theretofore.

The evidence is that Hyde Gillette and Howard Will went out of their way to attempt to explain the program to Mr.

Gillette, not because he was concerned over its details but because they felt it their duty to do so, and that they had some difficulty in getting beyond generalities in the discussion.

> "He wasn't a man whom you can discuss complicated business matters with very well. * * * he never said that he wanted his property divided after his death among his children. I had no such discussions as that with him." (Testimony of Howard A. Will, Pet. Main Br. 26-27.)

By this same process of attempting to support his position by attributing thoughts to the parties which they did not in fact entertain, respondent again disregards uncontradicted testimony when he discusses the antenuptial agreement. He says (Resp. Br. 27) that on September 17, 1938, when decedent signed the trust agreements, it was apparently already known that Miss O'Neil had no objection to the antenuptial agreement. But her direct testimony was that the subject of the antenuptial agreement was first mentioned to her later on that week-end when Mr. Gillette visited with her at Kenilworth, Illinois. That discussion did not go into any details. She first examined the agreement on the following Monday when she signed it. (R. 131; Pet. Main Br. 27, 35-37.)

It was the same sort of unsupported inferences and assumptions in the Tax Court's opinion that require its reversal.

IV.

A "Living" Motive for the Lake Beulah Conveyance Is Adequately Shown.

Respondent's principal contention with respect to the Lake Beulah property appears to be that decedent was not aware of any objections by Mr. and Mrs. Jenks in connection with that property, or even that they did not make

any serious objection. He also seizes upon a statement by Mrs. Jenks that she had no feeling about a new wife occupying this summer home.

At the time of the hearing Mrs. Jenks, who was subpoenaed by respondent, was 81 years of age, was hard of hearing and had difficulty understanding questions put to her, and was forgetful of such things as the year that her husband died and the year in which her brother was married. (R. 113-114; Steno. Trans. 18.) Although in 1938 she joined vigorously in objecting to the proposed marriage (R. 117, 118-119, 152-153, 157, 162, 166-167, 171), she now has little recollection of these events. The fact that her bitterness of 1938 has now been forgotten is a tribute to the success of the overall program proposed by Hyde Gillette at that time.

When the problems attending the Lake Beulah property were discussed with Miss O'Neil in June, 1938, she readily appreciated the situation. (R. 130, 157.) It can scarcely be assumed that decedent would be less sensitive to the personal complications involved in bringing a new wife to the family summer residence at Lake Beulah as co-head of the household. Respondent's attempt to show that decedent had no motive for transferring the Lake Beulah property except the far-fetched inference that he wanted to bar a dower right in his new wife, is not borne out by the evidence and can not stand the test of good judgment.

V.

The Kroger Case Does Not Support Respondent.

Since the decision in *Estate of B. H. Kroger,* 145 F. (2d) 901 (CCA 6, 1944), affirming a Tax Court memorandum decision, CCH Dec. 13,438(M),* it has become something

* When the *Kroger* appeal was heard, the *Dobson* rule was in effect. This has now been removed by legislation. (Pet. Main Br. 19.)

of a fad in the administration of the federal estate tax for the Commissioner to assert, in virtually every case of a transfer shortly before remarriage for the benefit of children of a prior marriage, that the decedent was acting to bar dower rights at his death and so was acting in contemplation of death. Respondent asserted that ground in the present case (R. 12), and now apparently seeks to maintain that position. The most important points of dissimilarity between the *Kroger* case and the Gillette case are as follows:

(1) Kroger transferred over half of his property for the clear-cut purpose of defeating statutory dower rights of his prospective wife in the event she should survive him, a likely event. This motive originated with Kroger and was the sole motive for the transfer. It was in keeping with his character as a successful businessman, responsible for the development of one of the largest grocery chains in the nation. By long-range planning he had started out with nothing and built a fortune. When he approached remarriage, he likewise contemplated the long-range consequences.

Comparable long-range vision or planning is completely inconsistent with Mr. Gillette's character. He had shown little concern over the property he owned. He did not enhance his patrimony, but dissipated it. It was no more than sources of income to him, and when some of the sources dried up he made no attempt to revive them. With such a long continuing lack of concern over the conservation of his property, it would have been wholly out of keeping with his character to have suddenly become concerned over its devolution at his death.

(2) Kroger thought directly of the effect of his remarriage upon the devolution of his property. This chain of reasoning led him directly to the creation of the trust.

Gillette's course of action was completely different. His

prospective marriage created not a whit of concern in his mind as to his property. His primary concern was the marriage itself.

The motive for Gillette's transfers originated with others. Mr. Jenks was concerned with repayment to his wife of the debt owed her by decedent, and protection of his wife's interest in property owned jointly with Gillette. Hyde Gillette, recognizing that the attitude of the Jenkses could wreck the marriage, or, at the least, would disrupt family harmony, proposed steps that would overcome these objections. Gillette's only motive was to do what seemed necessary to accomplish his marriage with the good wishes of his entire family. None of these motives looked towards decedent's death.

(3) Kroger's trust accomplished only one thing, the diversion of property from his wife to his children at his death. This was his sole objective. He even reserved the trust income to himself for his life.

Gillette's transfers of the Hartford Building and Lake Beulah properties accomplished his objective of removing obstacles to his marriage. In addition, his personal liability on the debt to his sister was provided for in such fashion that it would never trouble him again, and he was also relieved from any further obligation to share in the expense of the Lake Beulah property. Such considerations find no parallel in the *Kroger* case.

(4) Respondent conceives of a wife's dower interest as something that becomes important only at her husband's death. It was that particular aspect of dower, and that only, that was important to Kroger. But a wife's dower right has important attributes, attaching to her husband's real estate at the moment of marriage. (Pet. Main Br. 35-36.) It was the danger of such a right in Harriette O'Neil, attaching at the moment of marriage, that caused the parties in this case to fear impairment of title to the Hartford

Building and Michigan Avenue properties. This fear of an immediate consequence of the marriage has no relation to contemplation of death.

At the time that Kroger made the transfer that was held taxable, he made some additional transfers, also of substantial amounts, to his children and other relatives. The donees were entitled to immediate benefits. Kroger did not reserve a life income in this property. It is significant that these transfers were held not to have been made in contemplation of death.

Conclusion.

It is submitted that the Tax Court's conclusion was clearly erroneous and should be reversed with the finding that this decedent's transfers of the Hartford Building and Lake Beulah properties were not made in contemplation of death.

Respectfully submitted,

Edward H. McDermott,
Wm. M. Emery,
John S. Pennell,
Counsel for Petitioner.